

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH J. FLOWERS,

Plaintiff,

v.

ALAMEDA COUNTY SHERIFF GREGORY AHERN,  
et al.,

Defendants.

No. 08-04179 CW

ORDER DISMISSING  
SECOND AMENDED  
COMPLAINT WITH  
LEAVE TO AMEND  
AND ORDER DENYING  
MOTION FOR THREE-  
JUDGE PANEL  
(Docket # 26)

Plaintiff Joseph J. Flowers, a state inmate currently incarcerated at the Marin County jail, has filed this civil rights action concerning events that took place when he was a pretrial detainee in the Alameda County Jail.<sup>1</sup> On February 3, 2010, the Court issued a Second Order of Dismissal with Leave to Amend in which it noted that, in his original complaint, Plaintiff attempted to state claims against employees of the Alameda County Sheriff's Department, the Marin County Sheriff's Department, the Sacramento County Sheriff's Department and the Oakland Police Department. The Court ruled that Plaintiff's Second Amended Complaint (SAC) may include only claims against the named Defendants from the Alameda County Sheriff's Department and that, if he wished to pursue claims against employees of other law enforcement agencies, he must bring

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<sup>1</sup>Plaintiff does not explicitly state he was a pretrial detainee at the time of the events giving rise to his claims. However, the Court infers this from the allegations in his Second Amended Complaint.

1 those claims in separate lawsuits.<sup>2</sup> The Court also explained that,  
2 in an SAC, Plaintiff must allege facts showing what each named  
3 Defendant did that violated his constitutional rights and, if  
4 Plaintiff claimed that any of the Defendants were liable as  
5 supervisors, he must allege that they "participated in or directed  
6 the violations, or knew of the violations and failed to act to  
7 prevent them." On March 3, 2010, Plaintiff filed this SAC.

#### 8 BACKGROUND

9 In the captions of his original and first amended complaints,  
10 Plaintiff named Alameda County Sheriff Gregory J. Ahern and other  
11 individuals defendants. However, in the caption of his SAC, he  
12 only names Sheriff Ahern and indicates other individuals by use of  
13 "et al." The use of "et al." in the caption of a complaint fails  
14 to provide notice to the individuals who are being sued.  
15 Therefore, for this reason alone, the SAC must be dismissed with  
16 leave to amend for Plaintiff to name each individual he is suing in  
17 the caption of the amended complaint. The Court now reviews the  
18 SAC.

19 In his SAC, Plaintiff divides his factual allegations into the  
20 following eight claims.

#### 21 I. Claim One

22 From March 20, 2007 to August 2, 2007 and from May 13, 2008 to  
23 August 22, 2008, Plaintiff was placed in Administrative Segregation  
24 (AS) without judicial review or notice of any violations which  
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26 <sup>2</sup>For this reason, among others, the Court denies Plaintiff's  
27 motion for a three-judge panel to order his release from the Marin  
28 County jail. (Docket # 26).

1 warranted placing him in AS. Plaintiff alleges that Deputies  
2 Jones, Smith and Delima refused to file his grievances about being  
3 placed in AS. Plaintiff alleges that Sheriff Gregory Ahern  
4 participated in, supervised or directed this unlawful conduct and  
5 implemented the policy which allowed it to occur. Plaintiff brings  
6 this claim against Sheriff Ahern and Deputies Smith, C. Delima and  
7 Jones and mentions other defendants who are unknown at this time.  
8 As indicated above, only Sheriff Ahern is named in the caption of  
9 the SAC.

10 II. Claim Two

11 On August 3, 2007, Plaintiff gave two pieces of legal mail to  
12 the "out going mail personal person," who assured him that the mail  
13 would be shipped out soon. After Plaintiff had not heard from the  
14 court, he filled out a form to request a search for lost mail. He  
15 learned that his legal mail had been opened and the contents had  
16 been misplaced. As a result, a court ruling in his case was  
17 affected. Sheriff Ahern is responsible for the policy and  
18 procedures that allowed Plaintiff's mail to be opened and its  
19 contents to be lost. Plaintiff brings this claim against Sheriff  
20 Ahern and mentions deputies who are unknown at this time.

21 III. Claim Three

22 On August 2, 2007, Plaintiff was transferred from North County  
23 jail to Santa Rita jail. Upon arriving at Santa Rita jail,  
24 Plaintiff, who was wearing red clothing, was placed in a cell with  
25 two inmates who were dressed in yellow clothing. The colors  
26 represent segregation status and inmates wearing different colored  
27 clothing are not to be placed in cells together. The two inmates  
28

1 dressed in yellow clothes took possession of Plaintiff's legal  
2 materials, ripped them up and flushed them down the toilet. The  
3 legal materials were hard copies of Plaintiff's criminal appeal.  
4 Also, these inmates physically abused Plaintiff. Deputy Fisher  
5 witnessed this incident and could have prevented Plaintiff's abuse  
6 and the destruction of his legal materials, but she did nothing to  
7 prevent it. Plaintiff brings this claim against Sheriff Ahern and  
8 Deputy Fisher and mentions other unknown deputies. As indicated  
9 above, only Sheriff Ahern is named in the caption of the SAC.

10 IV. Claim Four

11 On May 13, 2008, Plaintiff was arrested<sup>3</sup> and taken to Santa  
12 Rita jail for routine booking. He was placed in handcuffs, taken  
13 to a closed-off section of the jail and beaten by several Sheriff's  
14 deputies. After the incident, Plaintiff was told not to report it.  
15 As a result of the beating, Plaintiff suffers from head, neck and  
16 back pain, hip problems and right wrist problems. Plaintiff brings  
17 this claim against Sheriff Ahern and mentions deputies who are  
18 unknown at this time.

19 V. Claim Five

20 On May 13, 2008, as a result of the above-mentioned assault,  
21 Plaintiff needed medical treatment, but the deputies, who knew of  
22 Plaintiff's need for medical treatment, refused to allow him to see  
23 a medical practitioner. Plaintiff was also not allowed to have  
24 physical therapy. Because of his lack of medical treatment,  
25 Plaintiff re-injured himself when he tried to walk up and down

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26  
27 <sup>3</sup>It appears that Plaintiff was arrested twice during the time  
28 period covered by the SAC.

1 flights of stairs. Sheriff Ahern's policies and procedures allowed  
2 his deputies to ignore Plaintiff's need for medical attention.

3 Plaintiff brings this claim against Sheriff Ahern and Deputies  
4 Jones, Smith, J. DeLeon, C. Nelson, C. Delima, R. Kull and A.  
5 Valvedia. Only Sheriff Ahern is named in the caption of the SAC.  
6 Plaintiff also mentions other deputies who are unknown at this  
7 time.

8 VI. Claim Six

9 On July 28, 2008, Plaintiff was harassed by being repeatedly  
10 strip searched without cause. Also, Deputies Smith, J. DeLeon, C.  
11 Delima and H.C. McGinness made verbal remarks about Plaintiff's  
12 private parts in the presence of female nurses and other inmates  
13 and repeatedly made fun of, humiliated and embarrassed Plaintiff.  
14 As a result, Plaintiff suffered severe emotional pain and  
15 suffering. Sheriff Ahern is also responsible.

16 Plaintiff brings this claim against Sheriff Ahern and Deputies  
17 Smith, DeLeon, Delima and McGinness. Only Sheriff Ahern is named  
18 in the caption of the SAC.

19 VII. Claim Seven

20 On August 21, 2008, Deputy W. Posey escorted Plaintiff from  
21 his cell to a medical appointment. Deputy Posey intentionally  
22 failed to secure Plaintiff's cell so that other inmates or deputies  
23 could enter his cell while he was gone and tamper with Plaintiff's  
24 legal documents and other personal property. Several of these  
25 legal documents were never returned to Plaintiff, which deprived  
26 him of his right to fair access to the courts. On July 10, 2008,  
27 Plaintiff forwarded to Deputy McNeill legal documents to be copied.

1 However, Deputy McNeill never returned these legal documents to  
2 Plaintiff. Plaintiff brings this claim against Deputies Posey and  
3 McNeill, who are not named in the caption of the SAC.

4 VIII. Claim Eight

5 From May 13, 2008 to October 1, 2008, the food Plaintiff was  
6 served was tampered with. For instance, Plaintiff was served beans  
7 with several metal objects, causing Plaintiff to choke. Some of  
8 the food served to Plaintiff was spoiled. Plaintiff found bugs on  
9 his food tray, put them in an envelope and gave them to Deputy C.  
10 Nelson for safe-keeping. Although Deputy Nelson promised to return  
11 the envelope to Plaintiff, he never did so. Sheriff Ahern's  
12 policies allowed the food-tampering. Plaintiff brings this claim  
13 against Sheriff Ahern and Deputy Nelson, who is not named in the  
14 caption. Plaintiff also mentions other deputies who are unknown at  
15 this time.

16 Plaintiff alleges that he has "filed and exhausted all legal  
17 county grievances allowed at the time of incarceration." For this  
18 initial review, the Court will accept these allegations as stating  
19 that Plaintiff has exhausted administrative remedies.

20 DISCUSSION

21 I. Review Under 28 U.S.C. § 1915A(a)

22 A federal court must conduct a preliminary screening in any  
23 case in which a prisoner seeks redress from a governmental entity  
24 or officer or employee of a governmental entity. 28 U.S.C.  
25 § 1915A(a). In its review, the court must identify any cognizable  
26 claims and dismiss any claims that are frivolous, malicious, fail  
27 to state a claim upon which relief may be granted or seek monetary  
28

1 relief from a defendant who is immune from such relief. 28 U.S.C.  
2 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.  
3 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
4 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
6 allege two essential elements: (1) that a right secured by the  
7 Constitution or laws of the United States was violated, and  
8 (2) that the alleged violation was committed by a person acting  
9 under the color of State law. West v. Atkins, 487 U.S. 42, 48  
10 (1988).

#### 11 II. Unnamed Defendants

12 Plaintiff purports to sue sheriff's deputies who are unknown  
13 at this time. In situations where the identity of alleged  
14 defendants cannot be known prior to the filing of a complaint, the  
15 plaintiff should be given an opportunity through discovery to  
16 identify the unknown defendants, unless it is clear that discovery  
17 would not uncover their identities or that the complaint should be  
18 dismissed on other grounds. Gillespie v. Civiletti, 629 F.2d 637,  
19 642 (9th Cir. 1980); Velasquez v. Senko, 643 F. Supp. 1172, 1180  
20 (N.D. Cal. 1986). Accordingly, the claims against unnamed  
21 defendants are DISMISSED without prejudice. If Plaintiff discovers  
22 any or all of their identities while this action is pending and can  
23 in good faith assert facts alleging constitutionally cognizable  
24 claims for relief against them, he may move for leave to amend his  
25 complaint to add them as named Defendants.

#### 26 III. Administrative Segregation -- Claim One

27 When a pretrial detainee challenges conditions of his  
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1 confinement, the proper inquiry is whether the conditions amount to  
2 punishment in violation of the Due Process Clause of the Fourteenth  
3 Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

4 "'[T]he State does not acquire the power to punish with which the  
5 Eighth Amendment is concerned until after it has secured a formal  
6 adjudication of guilt in accordance with due process of law.'" Id.  
7 (quoting Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)).

8       The state may detain a pretrial detainee "to ensure his  
9 presence at trial and may subject him to the restrictions and  
10 conditions of the detention facility so long as those conditions  
11 and restrictions do not amount to punishment or otherwise violate  
12 the Constitution." Id. at 536-37. If a particular condition or  
13 restriction of pretrial detention is reasonably related to a  
14 legitimate governmental objective, it does not, without more,  
15 amount to "punishment." Id. at 539. To determine whether  
16 particular restrictions and conditions accompanying pretrial  
17 detention amount to punishment in the constitutional sense of the  
18 word, the court first looks to whether the disability imposed is  
19 for the purpose of punishment or whether it is but an incident of  
20 some other legitimate governmental purpose. Id. at 538. For  
21 example, states must be able to maintain security and order at  
22 pretrial facilities, and restraints that are reasonably related to  
23 an interest in maintaining jail security are not, without more,  
24 unconstitutional punishment. Id. at 540.

25       Even though pretrial detainees' claims arise under the Due  
26 Process Clause, the Ninth Circuit has determined that the  
27 appropriate standard of review for evaluating constitutional claims  
28



1 of pretrial detainees is the same one used to evaluate convicted  
2 prisoners' claims under the Eighth Amendment. Carnell v. Grimm, 74  
3 F.3d 977, 979 (9th Cir. 1996). "The requirement of conduct that  
4 amounts to 'deliberate indifference' provides an appropriate  
5 balance of the pretrial detainees' right to not be punished with  
6 the deference given to prison officials to manage the prisons."  
7 Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991)  
8 (en banc). Disciplinary segregation as punishment for violation of  
9 jail rules and regulations cannot be imposed without due process,  
10 i.e., without complying with the procedural requirements of Wolff  
11 v. McDonnell, 418 U.S. 539 (1974). Mitchell v. Dupnik, 75 F.3d  
12 517, 523-26 (9th Cir. 1996).

13 Plaintiff's allegations that he was placed in administrative  
14 segregation without notice or any administrative review process is  
15 sufficient to state a due process violation claim against Deputies  
16 Smith, Delima and Jones. However, they cannot be served until  
17 Plaintiff submits an amended complaint listing them in the caption.  
18 Plaintiff's allegation that Sheriff Ahern's policies and procedures  
19 allowed the due process violation is sufficient to state a  
20 cognizable claim against him.

21 IV. Legal Mail -- Claim Two

22 Prisoners enjoy a First Amendment right to send and receive  
23 mail. Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (citing  
24 Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). A prison,  
25 however, may adopt regulations or practices which impinge on a  
26 prisoner's First Amendment rights as long as the regulations are  
27 "reasonably related to legitimate penological interests." Turner

1 v. Safley, 482 U.S. 78, 89 (1987). Prison officials may institute  
2 procedures for inspecting "legal mail," e.g., mail sent between  
3 attorneys and prisoners, see Wolff v. McDonnell, 418 U.S. 539, 576-  
4 77 (1974) (incoming mail from attorneys), and mail sent from  
5 prisoners to the courts, see Royse v. Superior Court, 779 F.2d 573,  
6 574-75 (9th Cir. 1986) (outgoing mail to court). But the opening  
7 and inspecting of "legal mail" outside the presence of the prisoner  
8 may have an impermissible "chilling" effect on the constitutional  
9 right to petition the government. O'Keefe v. Van Boening, 82 F.3d  
10 322, 325 (9th Cir. 1996) (citing Laird v. Tatum, 408 U.S. 1, 11  
11 (1972)). If so, prison officials must establish that legitimate  
12 penological interests justify the policy or practice. O'Keefe, 82  
13 F.3d at 327. Generally, "legal mail" may not be read or copied  
14 without the prisoner's permission. Casey v. Lewis, 43 F.3d 1261,  
15 1269 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 343 (1996).  
16 But again, prison officials may establish that legitimate  
17 penological interests justify the policy or practice. O'Keefe, 82  
18 F.3d at 327.

19 Plaintiff's allegations in claim two are sufficient to state a  
20 cognizable First Amendment claim against Sheriff Ahern for the  
21 policy and procedures that interfered with Plaintiff's receipt of  
22 his mail.

23 V. Attack By Other Inmates -- Claim Three

24 The Eighth Amendment requires that prison officials take  
25 reasonable measures to guarantee the safety of prisoners. Farmer  
26 v. Brennan, 511 U.S. 825, 832 (1994). In particular, prison  
27 officials have a duty to protect prisoners from violence at the  
28

1 hands of other prisoners. Id. at 833; Hearns v. Terhune, 413 F.3d  
2 1036, 1040 (9th Cir. 2005). The failure of prison officials to  
3 protect inmates from attacks by other inmates or from dangerous  
4 conditions at the prison violates the Eighth Amendment only when  
5 two requirements are met: (1) the deprivation alleged is,  
6 objectively, sufficiently serious; and (2) the prison official is,  
7 subjectively, deliberately indifferent to inmate safety. Farmer,  
8 511 U.S. at 834; Hearns, 413 F.3d at 1040-41.

9 The allegations in claim three are sufficient to state a  
10 cognizable claim against Deputy Fisher for deliberate indifference  
11 to Plaintiff's safety. However, Deputy Fisher cannot be served  
12 until Plaintiff submits an amended complaint with her name in the  
13 caption. Plaintiff fails to allege any conduct by Sheriff Ahern  
14 that violated his constitutional rights. Therefore, this claim  
15 against Sheriff Ahern is dismissed.

16 VI. Beatings by Deputies -- Claim Four

17 The treatment a prisoner receives in prison and the conditions  
18 under which he is confined are subject to scrutiny under the Eighth  
19 Amendment. Helling v. McKinney, 509 U.S. 25, 31 (1993). "After  
20 incarceration, only the unnecessary and wanton infliction of pain  
21 . . . constitutes cruel and unusual punishment forbidden by the  
22 Eighth Amendment." Whitley v. Albers, 475 U.S. 312, 319 (1986)  
23 (ellipsis in original). A pretrial detainee is protected from the  
24 use of excessive force by the Due Process Clause of Fourteenth  
25 Amendment, which is construed in the same way as the Eighth  
26 Amendment's proscription against cruel and unusual punishment.  
27 Graham v. Connor, 490 U.S. 386, 395 n.10. (1989); Carnell, 74 F.3d

1 at 979. A prison official violates the Eighth Amendment when two  
2 requirements are met: (1) the deprivation alleged must be,  
3 objectively, sufficiently serious, Farmer, 511 U.S. at 834 (citing  
4 Wilson v. Seiter, 501 U.S. 294, 298 (1991)), and (2) the prison  
5 official must possess a sufficiently culpable state of mind, i.e.,  
6 the offending conduct must be wanton, id. (citing Wilson, 501 U.S.  
7 at 297); LeMaire v. Maass, 12 F.3d 1444, 1451 (9th Cir. 1993).

8 The allegations in claim four state a cognizable cause of  
9 action for excessive force. However, Plaintiff fails to name any  
10 individuals who participated in these beatings, nor does he mention  
11 any conduct by Sheriff Ahern that implicates him in the  
12 constitutional violation. Therefore, this claim is dismissed with  
13 leave to move to amend should Plaintiff learn the identities of the  
14 deputies who took part in the physical abuse of Plaintiff.

15 VII. Deliberate Indifference to Serious Medical Needs -- Claim Five

16 Deliberate indifference to serious medical needs violates the  
17 Eighth Amendment's proscription against cruel and unusual  
18 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin  
19 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other  
20 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th  
21 Cir. 1997) (en banc). A pre-trial detainee's claim for deliberate  
22 indifference to medical needs derives from the due process clause  
23 rather than the Eighth Amendment's protection against cruel and  
24 unusual punishment. Gibson v. County of Washoe, 290 F.3d 1175,  
25 1187 (9th Cir. 2002) (citing Bell, 441 U.S. at 535). A  
26 determination of "deliberate indifference" involves an examination  
27 of two elements: the seriousness of the prisoner's medical need and  
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1 the nature of the defendant's response to that need. McGuckin, 974  
2 F.2d at 1059.

3 The allegations in claim five are sufficient to state a  
4 cognizable claim for deliberate indifference to Plaintiff's serious  
5 medical needs. However, although Plaintiff names Deputies Jones,  
6 Smith, DeLeon, Nelson, Delima, Kull and Valvedia in the body of  
7 this claim, he fails to allege the conduct of each individual  
8 deputy that violated his constitutional rights. Therefore, this  
9 claim is dismissed against these deputies with leave to amend to  
10 remedy this deficiency and to include them in the caption of the  
11 complaint. The allegation that Sheriff Ahern's policies and  
12 procedures enabled the individual deputies to violate Plaintiff's  
13 constitutional right to receive medical treatment for serious  
14 medical needs is insufficient to state a cognizable claim against  
15 him. This claim against him is dismissed with leave to amend, if  
16 he can correct this deficiency.

17 VIII. Strip Searches -- Claim Six

18 Incarcerated prisoners retain a limited right to bodily  
19 privacy. Michenfelder v. Sumner, 860 F.2d 328, 333 (9th Cir.  
20 1988). Shielding one's unclothed figure from the view of  
21 strangers, particularly strangers of the opposite sex, is impelled  
22 by elementary self-respect and personal dignity. Grummett v.  
23 Rushen, 779 F.2d 491, 494 (9th Cir. 1985). Prisoners and pretrial  
24 detainees in institutional settings may be subjected to strip  
25 searches and body cavity searches if they are conducted in a  
26 reasonable manner. Bell, 441 U.S. at 561 (1979). The Fourth  
27 Amendment right to be secure against unreasonable searches extends  
28

1 to incarcerated prisoners, although the reasonableness of a  
2 particular search must be determined by reference to the prison  
3 context. Michenfelder, 860 F.2d at 332.

4 The allegations in claim six regarding repeated strip searches  
5 state a cognizable cause of action for unreasonable search and  
6 seizure. However, Plaintiff does not name the deputy who  
7 repeatedly strip-searched him, nor does he mention any conduct by  
8 Sheriff Ahern that implicates him in the constitutional violation.  
9 The claim is dismissed with leave to move to amend should Plaintiff  
10 learn the identity of the deputy who strip-searched him. The other  
11 allegations in claim six that deputies engaged in verbal conduct  
12 are insufficient to state a cognizable constitutional claim. See  
13 Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (verbal  
14 harassment or abuse is insufficient to amount to a constitutional  
15 deprivation). Therefore, the claim based on verbal harassment is  
16 dismissed without leave to amend.

17 IX. Access to the Courts -- Claim Seven

18 State prisoners have a constitutional right of access to the  
19 courts. Lewis v. Casey, 518 U.S. 343, 350 (1996). To state a  
20 claim for a violation of the right of access to the courts, a  
21 prisoner must allege conduct on the part of the defendant that  
22 deprived him of access and show that he or she suffered from an  
23 actual injury as a result of that deprivation. Id. at 351. Actual  
24 injury means that the prisoner's pursuit of a legal claim was  
25 hindered or prevented. Id.

26 Plaintiff's allegations that Deputy McNeill did not return  
27 legal documents to him and that Deputy Posey allowed other deputies  
28

1 to steal Plaintiff's legal documents fail to state a claim because  
2 he does not allege that these actions impeded his pursuit of a  
3 legal cause of action. This claim is dismissed with leave to move  
4 to amend to include such allegations, if he truthfully can do so,  
5 and to name these deputies in the caption of his complaint.

6 An unauthorized intentional deprivation of property by a state  
7 employee is not a violation of a prisoner's due process rights if  
8 the state provides a meaningful post-deprivation remedy for the  
9 loss. Hudson v. Palmer, 468 U.S. 517, 533 (1984).

10 Plaintiff's allegations that Deputy Posey allowed other  
11 deputies to take personal property from Plaintiff's cell do not  
12 state a due process claim because the California legislature has  
13 provided a remedy for tort claims against public officials. See  
14 Blueford v. Puntty, 108 F.3d 251, 256 (9th Cir. 1997); Barnett v.  
15 Kenton, 31 F.3d 813, 186-17 (9th Cir. 1994) (California provides  
16 prisoners an adequate post-deprivation remedy for any property  
17 deprivations under California Government Code §§ 900 et seq., the  
18 California Tort Claims Act); Rider v. Felker, 2010 WL 458915, \*4  
19 (E.D. Cal. 2010) (same). This claim is dismissed without leave to  
20 amend.

21 X. Food Tampering -- Claim Eight

22 Adequate food is a basic human need protected by the Eighth  
23 Amendment. Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996),  
24 amended, 135 F.3d 1318 (9th Cir. 1998). The Eighth Amendment  
25 requires only that prisoners receive food that is adequate to  
26 maintain health; it need not be tasty or aesthetically pleasing.  
27 LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993).

1 Nutritionally complete food served to inmates is deficient under  
2 constitutional standards, however, if it is prepared under  
3 conditions so unsanitary as to make it unwholesome and a threat to  
4 inmates who consume it. Toussaint v. McCarthy, 597 F. Supp. 1388,  
5 1412 (N.D. Cal. 1984); cf. LeMaire, 12 F.3d at 1456 ("[t]he fact  
6 that the food occasionally contains foreign objects or sometimes is  
7 served cold, while unpleasant, does not amount to a constitutional  
8 deprivation"). Food that is spoiled and water that is foul would  
9 be inadequate to maintain health. Keenan, 83 F.3d at 1091.

10 The allegations in claim eight state a cognizable Fourth  
11 Amendment claim for ongoing tampering with Plaintiff's food so as  
12 to make it a threat to his safety. Plaintiff's allegations state a  
13 cognizable claim against Sheriff Ahern. However, the allegation  
14 that Deputy Nelson refused to return to Plaintiff an envelope that  
15 contained bugs found in his food is insufficient to state a claim  
16 against him. Therefore, this claim against Deputy Nelson is  
17 dismissed without leave to amend.

#### 18 CONCLUSION

19 For the foregoing reasons, the Court orders as follows:

20 1. All claims against unnamed defendants are dismissed with  
21 leave to move to amend if Plaintiff learns their identity through  
22 the discovery process.

23 2. Plaintiff's claims one, two, and eight are cognizable  
24 against Sheriff Ahern.

25 3. Plaintiff's claim one states a cognizable claim against  
26 Deputies Smith, Delima and Jones. However, they cannot be served  
27 until Plaintiff submits an amended complaint with their names



1 included in the caption.

2 4. Plaintiff's claim three states a cognizable claim against  
3 Deputy Fisher. However, she cannot be served until Plaintiff  
4 submits an amended complaint with her name in the caption.

5 5. Plaintiff's claim four is dismissed with permission to move  
6 for leave to amend if Plaintiff learns the identities of the  
7 individuals who violated his right to be free from excessive force.

8 6. Plaintiff's claim five against Sheriff Ahern and Deputies  
9 Jones, Smith, DeLeon, Nelson, Delima, Kull and Valvedia is  
10 dismissed with leave to amend to add allegations of each  
11 individual's conduct that constituted deliberate indifference to  
12 Plaintiff's serious medical needs.

13 7. Plaintiff's claim six regarding strip searches is dismissed  
14 with permission to move for leave to amend if Plaintiff learns the  
15 identity of the individual who repeatedly strip-searched him. The  
16 claim against Deputies Smith, DeLeon, Delima and McGinness based on  
17 verbal conduct is dismissed without leave to amend.

18 8. Plaintiff's claim seven against Deputy Posey for  
19 intentionally allowing other deputies to take Plaintiff's legal  
20 mail and against Deputy McNeill for not returning legal documents  
21 is dismissed with leave to amend to allege that these actions  
22 impeded his pursuit of a specific legal claim, if he truthfully can  
23 do so. The claim against Deputy Posey, to the extent it is based  
24 on allegations of the taking of Plaintiff's personal property, is  
25 dismissed without prejudice to pursuing in state court.

26 9. Plaintiff's claim eight states a cognizable cause of action  
27 against Sheriff Ahern, but is dismissed against Deputy Nelson  
28

1 without leave to amend.

2 10. Plaintiff is given thirty days from the date of this Order  
3 to submit a third amended complaint (TAC) which should include in  
4 the caption, in addition to Sheriff Ahern, the names of all  
5 defendants against whom Plaintiff has alleged cognizable claims:  
6 Deputies Smith, Delima, Jones, Fisher, DeLeon, Nelson, Kull,  
7 Valvedia, Posey and McNeill. In the TAC, Plaintiff may amend claim  
8 five for deliberate indifference to serious medical needs and claim  
9 seven for lack of access to the courts, if he truthfully can do so.  
10 If Plaintiff does not submit an amended complaint within thirty  
11 days, only Sheriff Ahern will be served with an order to answer the  
12 cognizable claims against him.

13 11. It is Plaintiff's responsibility to prosecute this case.  
14 Plaintiff must keep the Court informed of any change of address and  
15 must comply with the Court's Orders in a timely fashion. Failure  
16 to do so may result in the dismissal of this action for failure to  
17 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

18 12. Plaintiff's motion for a three judge panel to order his  
19 release from the Marin County jail (docket no. 26) is denied.

20  
21 IT IS SO ORDERED.

22  
23 Dated: June 3, 2010



24 CLAUDIA WILKEN  
25 United States District Judge  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH J. FLOWERS,  
Plaintiff,

Case Number: CV08-04179 CW

**CERTIFICATE OF SERVICE**

v.

ALAMEDA COUNTY SHERIFF et al,  
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 3, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Joseph J. Flowers  
Marin County Jail  
13 Peter Behr Dr.  
San Rafael, CA 94903

Dated: June 3, 2010

Richard W. Wieking, Clerk  
By: Ronnie Hersler, Adm Law Clerk

United States District Court  
For the Northern District of California